IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 415 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes : YES

2. To be referred to the Reporter or not? Yes :

3. Whether Their Lordships wish to see the fair copy of the judgement? No : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No : NO

5. Whether it is to be circulated to the Civil Judge? To be circulated to Magistrate courts and Sessions Courts. : YES

DILIPKUMAR SURYAKANT UPADHYAYA

Versus

PATEL NATAVARLAL MANIBHAI

Appearance:

MR RA MISHRA for Petitioner

DELETED for Respondent No. 1

MR VH THAKORE for Respondent No. 3

MR. A.J. DESAI, APP for Respondent No. 4

CORAM : MR.JUSTICE K.M.MEHTA

Date of decision: 20/03/2001

ORAL JUDGEMENT

Dilipkumar Suryakant Upadhyaya-applicant (Original complainant) has filed this revision application under Section 397 of the Code of Criminal Procedure against the judgement and order passed by the Judicial Magistrate First Class, Modasa (Bayad Camp) in

Criminal case No. 411 of 1999 below Exh. 11 dated 31.8.2000. The learned Magistrate by his order dated 31.8.2000 was pleased to accept the application filed by original accused No. 3 for dropping the proceedings.

2. The facts giving rise to this Criminal Revision Application are as under:

2.1 The applicant filed criminal case bearing No. 411 of 1999 in the court of Judicial Magistrate First Class, Modasa (Bayad Camp) against the present opponent No. 1, namely Patel Natvarlal Manibhai, Patel Gokarbhai Revabhai and original opponent No. 3, President/Chairman/Secretary/Manager of Shethshir B.C. Patel Hospital, P.O. Telnar. It appears that after that originally complaint was filed on 21.6.1999, the complainant has therefore amended the complaint on 31.8.2000 and as regards accused No. 3 it was stated that the present President-Secretary-cum-Manager of Shethshir B.C. Patel Hospital may be shown as accused No. 3.

2.2 The original complaint was filed on the ground that accused No. 1 was the Secretary of accused No. 3 Shethshir B. C. Patel Hospital and accused No. 2 was President of the said Hospital. It was alleged that both the accused were concerned for purchasing of medicine from 11.5.1998 to October, 1998. The accused purchased pharmaceutical medicines worth Rs. 1,78,401/- for the institution of accused No. 3. Out of that accused No. 1 and 2 paid Rs. 1,10,000/- and about Rs. 68,401/remaind due and payable. Accused Nos. 1 and 2 had thereafter paid Rs. 68,401/- by cheques dated 20.1.1998 and 30.12.1998. The complainant thereafter deposited the cheques on 29.4.1999 but the same were not honoured on the ground of insufficient funds. As the two cheques were dishonoured, the complainant had addressed notices dated 12.5.1999 to both the accused Nos. 1 and 2.

2.3 As regards accused No. 3, the complainant addressed a notice dated 13.5.1999 to accused No. 3. At that time accused No. 1 was the Secretary of accused No. 3 Institution and accused No. 2 was the President. Accused No. 3 was joined as a institution viz. Shethshir B.C. Patel Hospital at the relevant time and complainant also addressed a notice dated 13.5.1999 to the accused.

2.4 Thereafter the present complaint was filed under under Section 138 read with Section 114 of I.P.C. on

21.6.1999 against accused Nos. 1 to 3. The learned Judicial Magistrate First Class, Modasa, was pleased to issue summons in this behalf.

2.5 Thereafter, it appears that the complainant has amended the complaint and accused No. 3 was joined as Chairman/Secretary-cum-Manager of Shethshir B.C. Patel Hospital who was existing at that time. Thereafter, accused No. 3 had filed a discharge application on 18.5.2000 before the learned Judicial Magistrate First Class that he may be discharged or the proceedings against him may not be continued in this behalf. In that application he stated that all transactions in this case were alleged against accused No. 1 and 2 which were held in 1998 whereas accused No. 3 has been joined in the present application by way of amended complaint on 31.8.2000 and therefore, admittedly, he was not concerned with the transactions which took place in 1998. He stated that all allegations are made against accused Nos. 1 and 2 and accused No. 3 was not responsible or no offence has been attributed against accused No. 3 at the relevant time. There is no prima facie case against accused No. 3. He has been shown only to pressurise in this case.

2.6 The learned Judicial Magistrate First Class considered that application and held that there is no specific allegation against accused No. 3 in this behalf. The learned Judicial Magistrate First Class has held that when the offence alleged against accused Nos. 1 and 2, accused No. 3 was not at all responsible officer at the relevant time in accused No. 3 institution and he was not aware about the said incident and therefore accepted the application of accused No. 3 and directed that proceedings against accused No. 3 be dropped in this behalf.

3. Mr. R.A. Mishra, learned advocate for the applicant appeared and stated that opponent No. 3 was duly served with the notice under Section 138 of the Negotiable Instruments Act and demand was raised for the payment of amount of dishonoured cheque within 15 days. In spite of the receipt of the said notice, the accused failed and neglected to give any reply and rebut the allegations in notice that he is not liable to pay the amount or that he is not in the management of the said hospital and that he has no concern whatsoever with the said transaction. He submitted that this will clearly go to show that the accused has after committing the offence has tried to get out of the same by evading the trial. He further submitted that the learned Judicial Magistrate

First Class has failed and neglected to consider the most material aspect of the matter while passing the impugned order.

3.1 Mr. Thakore, learned advocate, appeared for original accused-opponent No. 3. He has submitted that the present case falls under Chapter XX of the Code of Criminal Procedure which relates to the trial of summons cases by Magistrates in this behalf. He has relied on Section 251 which provides substance of accusation to be stated, Section 252 which provides for conviction on plea of guilty, Section 253 which provides for conviction on plea of guilty in absence of accused in petty cases and Section 254 which provides for procedure when not convicted. Section 255 which provides acquittal or conviction. He has stated that in this case the alleged incident of dishonouring cheques occurred somewhere in April 1999 and both the accused Nos. 1 and 2 had given the cheques. Accused No. 3 was joined only as Institution-Hospital for which goods were purchased. He submitted that thereafter, the complainant has amended the complaint on 31.8.2000 and joined the Chairman/Secretary-cum-Manager of Shethshir B.C. Patel Hospital, Kapadwanj. He submitted that therefore, when the incident took place in April 1999 accused No. 3 was not at all the Secretary/President or was not holding any responsible position. He submitted that there is no offence which took place against accused No. 3. He was not aware what happened in April 1999 when cheques were dishonoured. He was not aware of the activity carried out by the hospital at the relevant time. The offence took place without his knowledge. He was also not responsible for carrying on business at the relevant time. It has been stated that the offence took place in April 1999 when accused No. 3 was not in-charge or was not responsible for the conduct of the business of accused No. 3 Institution-Hospital. He has also relied on Section Section 138 of the Negotiable Instruments Act which reads as follows:-

> "Sec. 138 - Dishonour of cheque for insufficiency etc., funds in the account:- Where any cheque drawn by a person on account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that

account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both:

provided that nothing contained in this section shall apply unless -

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice."

3.1(a) Section 141 of the Act reads as under:

"Offences by companies:- (1) If the person committing an offence under Section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly;

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had

exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly."

3.2 He has relied on the judgement of the Hon'ble Supreme Court in the case of K.M. MATHEW VS. STATE OF KERALA reported in AIR 1992 SC 2206. In this case at para 8 on page No. 2208 the Hon'ble Supreme Court has observed thus:-

"It is open to the accused to plead before the Magistrate that the process against him ought not to have been issued. The Magistrate may drop the proceedings if he is satisfied on reconsideration of the complaint that there is no offence for which the accused could be tried. It is his judicial discretion. No specific provision is required for the Magistrate to drop the proceedings or rescind the process. The order issuing the process is an interim order and not a judgement. It can be varied or recalled. The fact that the process has already been issued is no bar to drop the proceedings if the complaint on the very face of it does not disclose any offence against the accused."

3.3 Similarly he has also relied on the decision of the Apex Court in the case of SHAM SUNDER AND OTHERS VS. STATE OF HARYANA reported in AIR 1989 SC 1982. In para 9 after considering Section 10 of the Haryana Rice Procurement (Levy) Order 1979 the Hon'ble Supreme Court has observed as under:

"It is, therefore, necessary to add an emphatic note of caution in this regard. More often it is common that some of the partners of a firm may not even be knowing of what is going on day to day in the firm. There may be partners, better known as sleeping partners who are not required

to take part in the business of the firm. There may be ladies and minors who were admitted for the benefit of partnership. They may not know anything about the business of the firm. It would be a travesty of justice to prosecute all partners and ask them to prove under the proviso to sub-section (1) that the offence was committed without their knowledge. It is significant to note that the obligation for the accused to prove under the proviso that the offence took place without his knowledge or that he exercised all due diligence to prevent such offence arises only when the prosecution establishes that the requisite condition mentioned in sub-section (1) is established. The requisite condition is that the partner was responsible for carrying on the business and was during the relevant time in charge of the business. In the absence of any such proof, no partner could be convicted. We, therefore, reject the contention urged by counsel for the State."

3.4 He has further relied on the decision of the Apex Court in the case of STATE OF HARYANA VS. BRIJ LAL MITTAL AND OTHERS reported in 1998(4) Supreme Today 364. After referring to Section 34 of the Drugs and Cosmetics Act, 1940, though section is pari materia of Section 141 of the Act, the Hon'ble Apex Court on page 369 observed as under:

"It is thus seen that the vicarious liability of a person for being prosecuted for an offence committed under the Act by a company arises if at the material time he was in charge of and was also responsible to the company for the conduct of its business. Simply because a person is a director of the company it does not necessarily mean that he fulfills both the above requirements so as to make him liable. Conversely, without being a director a person can be in-charge of and responsible to the company for the conduct of its business. From the complaint in question we, however, find that except a bald statement that the respondents were directors of the manufacturers, there is no other allegation to indicate, even prima facie, that they were in charge of the company and also responsible to the company for the conduct of its business."

3.5 Further reliance is also placed on the judgement of the Hon'ble Supreme Court in the case of K.P.G. NAIR

VS. M/S. JINDAL MENTHOL INDIA LTD. reported in 2000(6) Scale 578. In para 7 the Hon'ble Supreme Court has held as under:

"From a perusal of the excerpts complaint it is seen that nowhere it is stated that on the date when the offence is alleged to have been committed, the appellant was in-charge of or was responsible to the accused company for the conduct of its business."

Thereafter in para 8 the Hon'ble Apex Court observed as under:

"From a perusal of Section 141 it is evident that in a case where a company committed offence under Section 138 then not only the company but also every person who at the time when the offence was committed, was in-charge of and was responsible to the company for the conduct of the business of the company shall be deemed to be guilty of the offence and liable to be proceeded against and punished accordingly. It follows that a person other than the company can be proceeded against under those provisions only if that person was in-charge of and was responsible to the company for the conduct of its business."

3.6 He has also relied upon unreported judgement of this court in Criminal Misc. Application No. 3748 of 1996 decided by this court (Coram: S.D. Pandit, J) on 18.10.1996. This matter also related to the Negotiable Instruments Act. In that case complaint was filed against the Company and other accused on the ground that other accused were the Manager of the company, Chairman and Managing Director of the Company and other directors of the Company. On page 3 of the said judgement, the Court has observed as under:

"It is very pertinent to note that the complainant has no where alleged in his complaint that the accused No. 7-the petitioner before me is in actual management of the business of the accused No. 1 company. It is not the claim of the complainant that petitioner-accused No. 7 was conducting the business of the company. When the complainant does not allege in his complaint that the accused-petitioner was responsible to the company for the conduct of the business or that he was incharge of the business of the company or that he was looking after the day

to-day affairs of the company, merely because the accused petitioner being the director of the company the complainant would not be justified in naming him as an accused in the case."

3.7 Thereafter, after considering the judgement of the Hon'ble Apex Court in the case of Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi & Ors. reported in AIR 1983 SC page 67, the learned Single Judge on pages 4 and 5 of the judgement has held as under:

"In the present case, there is not a single averment made by the complainant respondent No. 1 in the complaint to hold that in view of the said averments the petitioner-accused will have to go before the Trial Court. Merely because the petitioner-accused happens to be the director, even taking into consideration of the provisions of Section 141 of the said Act, the prosecution launched against the petitioner-accused will have to be quashed. The view taken by me is also taken by this Court (B.C. Patel, J) in the earlier decision in Cri. Misc. Appln. No. 601/91 to 603/91 and 606/91 and 705/91 and 706/91 on 27.12.93. Thus, I hold that in view of the averments made in the complaint itself, the order of issue of process against the petitioner-original accused No. 7 is not justified and therefore, the petitions will have to be allowed and the order of issue of process against the petitioner in cri. case nos. 244/91 to 247/91 and 285/91, 316/91 and 317/91 will have to be quashed."

3.8 Relying upon these authorities, he has stated that in this case accused No. 3 was not at all concerned with the cheques issued by accused Nos. 1 and 2 and he was not aware of the act of accused Nos. 1 and 2 of issuing cheques in this behalf. In view of the same, there are no allegations against accused No. 3 as to how he has committed the offence. The learned counsel for accused No. 3 has submitted that the order of the Judicial Magistrate First Class dropping the proceedings against accused No. 3 is perfectly legal and valid. He has also relied on the judgement of this court in Criminal Revision Application No. 29 of 2001 which has been decided by this court (Coram: K.M. Mehta, J) on 17.3.2001.

3.9 He has also relied on the decision of A.P. High

Court in the case of B. LAKSHMI VS. M/S. TRISHUL COAL SERVICES & TRANSPORT AND OTHERS reported in 1997(4) Crimes 157 in which on page 159 at para 8 the Court observed thus:

> "It is clear from a reading of Section 141 of the Act that if the offence under Section 138 of the Negotiable Instruments Act is committed by the company or a firm, every person who was incharge and responsible for the affairs and conduct of the business of the company or firm, as the case may be, at the time when the alleged offence was committed, is also liable for prosecution along with the company. It is an admitted fact, in this case, that the cheque was issued by A-2 the Managing Partner of A-1 firm, and undisputably there is no allegation in the complaint that the petitioner herein (A-3) was incharge and responsible for the conduct of the business of the A-1 firm at the time of alleged commission of the offence. Therefore, in the absence of any such allegation and when admittedly, the cheque was issued by A-2, the Managing Partner of A-1 firm and in view of Sections 138 and 141 of the Negotiable Instruments Act, I have no hesitation in holding that the complainant is not entitled to initiate prosecution against every partner of the firm. The same view was taken by the High Courts of Punjab and Haryana in a decision Amrit Rani Vs. M/s. Malhotra Industrial Corporation (1992) T.S.J. (Banking) 129), and hence, the proceedings against the petitioner are liable to be quashed and accordingly quashed."

4. In my view in this case the complaint was filed on 21.6.1999. At that time accused No. 3 Institution was joined as party. Thereafter, the complainant has amended the complaint on 13.8.2000 and joined the existing Chairman/Secretary/Manager of the said Shethshir B.C. Patel Hospital as accused No. 3. All allegations were made against accused Nos. 1 and 2 who had issued the cheques. Accused No. 3 was only the Institution at the relevant time. However, the complainant has amended the complaint only in August 2000 and thereafter the Chairman/Secretary/Manager of the Institution has been joined as accused No. 3. In this case as stated above, the offence took place in April, 1999 whereas accused No. 3 was joined in August 2000. Accused No. 3 was not at all concerned with the offence which took place in April, 1999. In view of the above facts and circumstances of the case, provisions of Section 138 read with Section 141

of the Negotiable Instruments Act read with section 114 of I.P.C. are not attracted. Accused No. 3 was not responsible to the Hospital for carrying on business of the Trust at the relevant time (when the offence took place). He was not in-charge of the business of the Trust at the relevant time. Accused No. 3 cannot be deemed to be guilty of offence and cannot be liable to be punished for the offence accordingly. There are no clear and specific allegations against accused No. 3 that the business of the Institution has been carried out with his knowledge or he was responsible to the trust in carrying on the business at the relevant time. In this case the offence has taken place without the knowledge of accused No. 3 and therefore also the proceedings cannot be continued against him.

5. I have gone through the order of the learned Judicial Magistrate First Class, Modasa (Bayad Camp). In my view the learned Judicial Magistrate First Class has given cogent and convincing reasons for dropping the proceedings against accused No. 3. I, therefore, do not see any reason to interfere with the order of the learned Magistrate dropping the proceedings against accused No. 3. In view of the same, the revision application is rejected. No order as to costs.

(K.M. MEHTA, J)
(pkn)